United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

SIGNED COPY

NO. 77-7111

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO,
Plaintiffs-Appellees,

versus

WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ,
Defendants,

WESTERN CONNECTICUT BROADCASTING COMPANY AND KINGSLEY GILLESPIE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES

SIDNEY VOGEL
25 Third Street
Stamford, Connecticut 06905

Attorney for
Paul Kuczo, Jr. and
John J. P. Nocerino

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 (504) 821-1620

UNITED STATES COURT OF APPEALS
MAY 12 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

ARGUMENT 1

TABLE OF AUTHORITIES

Cases:

Jackson v. Metropolitan Edison Company, 319 U.S. 345 3

Home Telephone and Telegraph v. City of Los Angeles, 227 U.S. 278 5

Smith v. Allwright, 321 U.S. 649 5

Terry v. Adams, 345 U.S. 461 5

Marsh v. Alabama, 326 U.S. 501 5

Statutes:

42 U.S.C. Sec. 1331 2

Other Authorities:

Anno. 42 L. Ed. (2) 922 5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7111

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO.
Plaintiffs-Appellees,

versus

WESTERN CONNECTICUT BROADCASTING
COMPANY, KINGSLEY GILLESPIE
AND JULIAN SCHWARTZ,
Defendants,

WESTERN CONNECTICUT BROADCASTING
COMPANY AND KINGSLEY GILLESPIE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES

ARGUMENT

I.

As is stated in Appellants' Statement of Fact, the case came before the Court on a Motion for Summary

Judgment annexed to which was a Memorandum of Law (J.A. 18) the initial decision of the Federal Communications Commission (J.A. 61) and the final decision of that Commission (J.A. 129). The Affidavit of KINGSLEY GILLESPIE (J.A. 56) was likewise attached.

In response, Plaintiffs pointed out that there were sufficient questions of fact to require a trial and that therefore the Motion for Summary Judgment ought to be denied.

The Court, in its decision (J.A. 168), touched on two matters:

1. The question of State action on the part of Defendants WESTERN CONNECTICUT BROADCASTING COMPANY and JULIAN SCHWARTZ: and

2. The question of jurisdiction.

As to the latter, no error has been assigned by any Defendant or amicus curiae and, accordingly, the point will not be touched upon in this brief. Suffice to say, Judge Lumbard found that jurisdiction was proper under 42 U.S.C. Sec. 1331.

II.

The prime question on this appeal and the one to which all appealing briefs have been directed, is the Finding by Judge Lumbard that the censoring of the Kuczo and Nocerino radio broadcasts in the campaign preceding the local election in Stamford of

November, 1969 was "State" action, and that the violation of the First Amendment occasioned by, ostensibly, a private party, could really be considered State or Governmental action.

Judge Lumbard's inquiry was taken from *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 42 L. Ed. (2) 477, 95 Sup. Ct. 449 (1974).

> "The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."

In making the inquiry, Judge Lumbard was not unaware of the language appearing, in the same case, at 419 U.S., page 354:

> "Doctors . . . are all in regulated businesses providing arguably essential goods and services 'affected with a public interest'. We do not believe that such a status converts their every action, absent more, into that of the State."

And, in the same case, Judge Lumbard was undoubtedly aware of the dissenting language of Mr. Justice Marshall. Mr. Justice Marshall points out that properly to establish the connection required by the inquiry, three things must be found:

1. The State sanctioned monopoly;

2. An extensive pattern of cooperation between the "private" entity and the State; and

3. A service uniquely public in nature.

In his dissent, further remarks by Judge Marshall may be paraphrased as follows:

> "I cannot believe that this Court would hold that the State's involvement with the [radio station] was not sufficient to impose upon the company an obligation to meet the constitutional mandate of [uncensored political speech]." Bracketed insert ours.

Judge Lumbard had before him the complete fact situation, not only as it appeared from the Complaint and Answer, but the evidence, as set forth in the two FCC decisions. (J.A. 61, 129). He was able, from an examination of these documents, (J.A. 67, 70, 125), to know that every medium of public communication in Stamford was in one ownership. Both the daily newspaper and the radio station were owned by the same interests. There was no other newspaper, and there was no other radio station in Stamford. The Judge was not unaware that there could be different fact situations. Footnote 3 to his decision indicates that awareness. On the other hand, the practicals of the situation indicate quite clearly that these candidates had no choice, if they were to use the radio at all, but to speak over the monopolistic local radio. Neither would they have choice, as a practical proposition, except to obey whatever censorship was required of them, whether that censorship was proper or no.

The second requirement, as stated by Mr. Justice Marshall, called for an extensive pattern of cooperation between the private "entity" and the State. There would be no radio station at all except as licensing existed from the Federal Communications Commission. There, quite apparently, was some degree of interference in the election in that the pronouncements of one candidate were never censored while those of the other two were censored to the point where ultimately the Federal Communications Commission decided to punish. *Home Telephone and Telegraph vs. Los Angeles,* 227 U.S. 278 (1913).

The third consideration, that the service must be uniquely public in nature, is obvious. As pointed out by Appellants themselves, the prime purpose of the whole structure is to provide an informed public. The whole purpose of political campaigning is to acquaint the voting public with the reasons why one candidate desires preference over another. Certainly the radio station has certain private rights, but once it embarks upon its function as a medium for the dissemination of campaign information, its service is not only public and unique, and, in this case absolutely unique, but actually functional to the point of being governmental. It is not to be forgotten that the case involved an election of public officials.

Reliance is placed on *Smith v. Allwright,* 321 U.S. 649, 88 L. Ed. 987, 64 Sup. Ct. ____. See also *Terry v. Adams,* 345 U.S. 461, 97 L. Ed. 1152, 73 Sup. Ct. 809. The Court relied on *Marsh v. Alabama,* 326 U.S. 501 (1946). That case is very much in point. And, see note at 42 L. Ed. (2) 922.

CONCLUSION

The District Court's decision is eminently justified in law and fact and should be sustained.

Respectfully submitted,

Sidney Vogel

Sidney Vogel
Attorney for PAUL
KUCZO, JR. and
JOHN J. P. NOCERINO,
Plaintiffs-Appellants
25 Third Street
Stamford, Conn. 06905
(203) 359-1080

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing "Brief for Appellees" were served this 11 day of May, 1977 on the below-listed individuals by U. S. mail, first class, postage prepaid.

Paul C. Jamieson, Esq.
500 Summer Street
Stamford, Connecticut 06901

Thomas H. Wall
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Alan C. Campbell
Richard D. Marks
John R. Feore, Jr.
c/o Dow, Lohnes & Albertson
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Everett H. Erlick
1330 Avenue of the Americas
New York, New York 10020

James A. McKenna, Jr.
Carl R. Ramey
c/o McKenna, Wilkinson & Kittner
Suite 1100
1150-17th Street, N. W.
Washington, D. C. 20006

Ralph E. Goldberg
51 W. 52d Street
New York, New York

J. Roger Wollenberg
Timothy B. Dyk
Donald C. Langevoort
c/o Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006

Erwin G. Krasnow
Brenda Fox
c/o National Association of Broadcasters
1771 N Street, N. W.
Washington, D. C. 20036

Corydon B. Dunham
30 Rockefeller Plaza
New York, New York 10020

Irving R. Segal
Eugene Spector
c/o Schnader, Harrison, Segal & Lewis
1719 Packard Building
Philadelphia, Penna. 19102

Norman M. Sinel
475 L'Enfant Plaza W., S. W.
Washington, D. C. 20024

Harry M. Plotkin
Theodore D. Frank
c/o Arent, Fox, Kintner, Plotkin & Kahn
Suite 1200
1815 H Street, N. W.
Washington, D. C. 20006

J. Laurent Scharff
c/o Pierson, Ball & Dowd
Ring Building
1200 18th Street, N. W.
Washington, D. C. 20036

Werner K. Hortenberger
Daniel M. Armstrong
John L. Ingle
Robert S. Foosaner
c/o Federal Communications Commission
Washington, D. C. 20554

No. 77-7111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL KUCZO, et al.,
Plaintiffs/Appellees,

v.

WESTERN CONNECTICUT BROADCASTING CO., et al.,
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

BRIEF OF FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

WERNER K. HARTENBERGER,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JOHN E. INGLE,
Counsel,

ROBERT S. FOOSANER,
Counsel.

Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112

UNITED STATES COURT OF APPEALS
FILED
APR 25 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
A. THE FCC AND SECTION 315 OF THE COMMUNICATIONS ACT	3
B. THE STAMFORD CASE	6
ARGUMENT	11
I. WESTERN'S CENSORSHIP OF THE PLAINTIFFS' POLITICAL MESSAGES WAS NOT GOVERNMENT ACTION.	11
II. THE FIRST AMENDMENT DOES NOT PROHIBIT BROADCASTERS FROM EDITING POLITICAL MESSAGES.	17
III. IMPLICATION OF A DAMAGES REMEDY FOR CENSORSHIP OF SECTION 315 ANNOUNCEMENTS WOULD FRUSTRATE VITAL REGULATORY POLICY.	23

TABLE OF AUTHORITIES

	Page
Cases:	
Ackerman v. CBS, 301 F. Supp. 628 (S.D.N.Y. 1969).	16
Alexandra Mark v. FCC, 468 F.2d 266 (1st Cir. 1972).	23
Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969).	24
Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), rev. sub nom. CBS v. DNC, 412 U.S. 94 (1973).	12
Capitol Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd sub nom. Capitol Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972).	19
Chisholm v. FCC, 528 F.2d 349 (D.C. Cir.); cert. denied, ___ U.S. ___ (1976).	22
Chisholm v. FCC, No. 75-1505, D.C. Circuit.	6
Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).	passim
Daly v. CBS, 309 F.2d 83 (7th Cir. 1962).	22
Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959).	4, 5, 22
Gordon v. NBC, 287 F. Supp. 452 (S.D.N.Y. 1968).	23
Home Telegraph & Telephone Co. v. City of Los Angeles, 227 U.S. 278 (1913).	16
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).	12, 13

Page

Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950). 13, 23

McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945). 13, 23

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). 20

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). 12, 14

Moro v. Telemundo, Inc., 387 F. Supp. 920 (D.P.R. 1974). 13

National Broadcasting Co. Inc. v. United States, 319 U.S. 190 (1943). 19

National Broadcasting Co., Inc. v. FCC, 516 F.2d 1100 (D.C. Cir. 1974), vacated other grounds, 516 F.2d 1180 (1975), cert. denied sub nom. Accuracy In Media, Inc. v. NBC, 424 U.S. 910 (1975). 20

New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975). 14, 17

Post v. Payton, 323 F. Supp. 799 (E.D.N.Y. 1971). 13

Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). 14

Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976). 18, 21

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952). 11, 13

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). passim

Smothers v. Columbia Broadcasting System, Inc., 351 F. Supp. 622 (C.D. Cal. 1972). 13

Page

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976). 19

Wahba v. New York University, 492 F.2d 96 (2d Cir.), cert. denied, 419 U.S. 874 (1974). 16, 17

Administrative Actions:

Fairness Report, 48 FCC 2d 1 (1974), 58 FCC 2d 691 (1976), review pending sub nom. National Citizens Committee for Broadcasting v. FCC, No. 74-1700, D.C. Circuit. 21

Public Broadcasting Council of Central New York, FCC 76-1005, October 27, 1976. 6

Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510 (1972). 4

Use of Broadcast Facilities by Candidates for Public Office, 24 FCC 2d 832 (1970). 4

Use of Broadcast Facilities by Candidates for Public Office, 3 FCC 2d 463 (1966). 4

Western Connecticut Broadcasting Co. (Docket No. 19043), FCC 70-1093, released October 8, 1970. 7

Western Connecticut Broadcasting Co., 43 FCC 2d 730 (1973). 7, 21

Western Connecticut Broadcasting Co. (Docket Nos. 19872, 19873), 44 FCC 2d 673 (1973). 8

Western Connecticut Broadcasting Co., FCC 77D-3, released January 14, 1977. 9, 12

Statutes and Regulations:

28 U.S.C. §1331 9, 10
28 U.S.C. §1343 9
42 U.S.C. §1985 9

	Page
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151-609:	
Section 155(d)(4)	9
Section 307	20
Section 309(e)	4, 8
Section 312	4, 8
Section 315	passim
Section 402	16
Section 501	5
Section 503(b)(1)(B)	4
47 C.F.R. §73.120	4
47 C.F.R. §73.290	4
47 C.F.R. §73.657	4
P.L. 86-677, 47 Stat. 554, 86th Cong., 2d Sess. (1960).	22
Other Authorities:	
H. Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969).	16
S. Rep. No. 562 (Equal-Time Amendment to Communications Act of 1934), 86th Cong., 1st Sess. 10 (1959).	6, 22

BRIEF OF FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7111

PAUL KUCZO, et al.,
Plaintiffs/Appellees,

v.

WESTERN CONNECTICUT BROADCASTING CO., et al.,
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

The Federal Communications Commission files this Brief as Amicus Curiae, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, in support generally of the position of the appellants that the district court's ruling should be reversed. The Commission files this brief because it regards the issues as important to its regulatory responsibilities.

STATEMENT OF ISSUES PRESENTED

1. Whether a privately owned and operated radio station's censorship of political messages sought to be aired by candidates during an election campaign, in

violation of Section 315 of the Communications Act and of rules and policies of the FCC, constitutes "federal action" so as to confer jurisdiction on a federal district court to entertain a suit for damages for violation of the candidates' asserted First Amendment rights?

2. If there be federal action sufficient to confer jurisdiction, whether candidates have a First Amendment right that is abridged when a broadcast licensee censors political messages in violation of Section 315 and the relevant FCC rules and policies?

STATEMENT OF THE CASE

Mr. Kuczo and Mr. Nocerino, the plaintiffs in this case, were unsuccessful candidates for mayor of Stamford, Connecticut, in 1969. They brought this suit in October 1972 against the licensee, the president and the general manager of broadcast stations WSTC and WSTC-FM in Stamford, alleging that the stations and their principals had violated their constitutional rights by censoring the paid political messages the two candidates individually had sought to have broadcast in support of their candidacies. Their suit asked actual and punitive damages.

The case is before this Court on interlocutory appeal from an order of the U.S. District Court for the

District of Connecticut (Lumbard, J.), [1] denying a defense motion for summary judgment. The motion argued, in part, that the complaint failed to state a cause of action because the alleged wrongs were committed by private broadcast stations which are not subject to the strictures of the First Amendment. Constitutional prohibitions, the motion argued, restrict governmental conduct, but not the conduct of private parties. The district court found, however, that "the actions by the radio station and its employees did constitute federal action subject to the First Amendment under the circumstances of this case." Kuczo v. Western Connecticut Broadcasting Co., 424 F.Supp. 1325, 1328 (D. Conn. 1976) (J.A. 172).

A. THE FCC AND SECTION 315 OF THE COMMUNICATIONS ACT

The FCC licenses and regulates radio and television stations pursuant to the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§151-609. Among the Commission's responsibilities is the enforcement of Section 315(a) of the Act, which states, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no

1/ Judge Lumbard, a member of this Court, was sitting by designation. 28 U.S.C. §291(c).

> power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate ....

Section 315(g) requires the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."[2/]

The Commission has issued extensive public notices setting forth the substantive requirements of Section 315, the procedures to be followed by broadcasters and by parties who perceive possible violations of the requirements, and exemplary interpretive rulings on specific questions that might arise under Section 315.[3/] The Commission has authority to enforce Section 315 by imposing forfeitures for violations,[4/] by issuing cease and desist orders,[5/] by considering a licensee's Section 315 record in renewal proceedings,[6/] by invoking license revocation proceedings,[7/]

2/ The rules are set forth at 47 C.F.R. §73.120 (AM radio); 47 C.F.R. §73.290 (FM radio); and 47 C.F.R. §73.657 (television).

3/ E.g., Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510 (1972); Use of Broadcast Facilities by Candidates for Public Office, 24 FCC 2d 832 (1970); Use of Broadcast Facilities by Candidates for Public Office, 3 FCC 2d 463 (1966).

4/ 47 U.S.C. §503(b)(1)(B).

5/ 47 U.S.C. §312(b).

6/ 47 U.S.C. §309(e). See also Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525, 534 (1959).

7/ 47 U.S.C. §312(a)(4).

and, in extreme cases, by referring the matter to the Justice Department for possible criminal prosecution. 8/

The principal enforcement tool, however, is prompt action on complaints, generally made by candidates during the election campaigns. On receipt of an oral or written complaint establishing a prima facie case of violation, the Commission typically will inquire into the matter immediately -- often by telephone call to the licensee. If its inquiry indicates that tne candidate is entitled to broadcast time or that the licensee is otherwise in violation of Section 315, the Commission will orally instruct the licensee to comply with Section 315 so that the public will have an opportunity to hear the candidate at the crucial election time.

This procedure comports with the purpose of Section 315 to "facilitate political debate over radio and television." Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525, 534 (1959). It permits immediate compliance at a time when it can still be meaningful to the voters or potential voters in the broadcast audience. The Senate Committee on Interstate and Foreign Commerce has emphasized the importance of timeliness in the realization of the policies behind Section 315:

8/ 47 U.S.C. §501.

> An informed public is indispensable for the continuance of an alert and knowledgeable democratic society. The public should not be deprived of the benefits that flow from this dynamic form of communications during the critical times of the political campaign.

S. Rep. No. 562 (Equal-Time Amendment to Communications Act of 1934), 86th Cong., 1st Sess. 10 (1959). The Commission's policy of on-the-spot enforcement ensures that the congressionally mandated political debate will take place at the "critical times of the political campaign." Id. 9/ See, e.g., Public Broadcasting Council of Central New York, FCC 76-1005, October 27, 1976, where the Commission stated:

> Because of the proximity of the election, all licensees involved in this complaint have been notified of the above decision by telephone in order that they may make appropriate arrangements to comply with their "reasonable access" obligations prior to the election.

B. THE STAMFORD CASE

Mr. Kuczo and Mr. Nocerino ran for mayor of Stamford in 1969 along with a third candidate, Mr. Wilensky. All three candidates bought time on stations WSTC and WSTC-FM to make political announcements. Mr. Wilensky won the election.

9/ The courts of appeals similarly have expedited consideration of review proceedings and petitions for interim relief in connection with Section 315 complaints. See, e.g., Chisholm v. FCC, No. 72-1505, D.C. Circuit (order of June 2, 1972, granting interim relief from the FCC's denial of a request for order requiring the networks to permit the petitioner, as a candidate, to participate in news interview programs).

Neither Mr. Kuczo nor Mr. Nocerino complained to the Commission during the campaign about his treatment by the radio stations.

After the election was over, the two losing candidates filed complaints with the Commission alleging that the stations had censored their political announcements, in violation of Section 315. After obtaining a response from the licensee, the Commission initiated a hearing to determine whether there had been violations, and, if so, whether the owner of the stations should have its licenses revoked or a forfeiture imposed. 10/ After a full evidentiary hearing, in which the licensee admitted the violations of Section 315, the FCC imposed a forfeiture of $10,000, the maximum permitted by law. 11/ The Commission declined to revoke the licenses because the stations' "overall programming was good enough to tip the scales against revocation and to permit a conclusion that Western is qualified to remain a licensee ...." 43 FCC 2d at 741 (J.A. 143). The order made clear, however, that the decision not to revoke did not place the licensee

10/ Western Connecticut Broadcasting Co. (Docket No. 19043), FCC 70-1093, released October 8, 1970.

11/ Western Connecticut Broadcasting Co., 43 FCC 2d 730 (1973)(J.A. 132). The Initial Decision of the hearing examiner is reported at 43 FCC 2d 752 (J.A. 65).

in a "preferred position in any comparative proceeding concerning its renewal application." Id. [12]

In the meantime, Western's licenses came up for renewal. In addition to Western's application for renewal the Commission received a competing application for the Stamford AM station license. It designated the two applications for a comparative hearing to determine which should get the license for the AM station. [13] In its designation order, the Commission repeated the "caveat" that its revocation decision did not put Western in a "preferred position" in the comparative renewal hearing; it expressly instructed the administrative law judge that the matters raised in the revocation proceeding (including the Section 315 violations) "may be considered within the context of the comparative issue" in the renewal hearing.

After hearings in 1975 and 1976, the administrative law judge issued an Initial Decision finding that the competing applicant, Radio Stamford, Inc., was better qualified than Western under the Commission's standard comparative criteria. The Initial Decision, awarding the

---

12/ In a revocation proceeding, the burden of proof is on the Commission. 47 U.S.C. §312(d). In a renewal proceeding, however, the burden is on the applicant to show that grant of its license will serve the public interest, convenience and necessity. 47 U.S.C. §309(e).

13/ Western Connecticut Broadcasting Co. (Docket Nos. 19872, 19873), 44 FCC 2d 673 (1973).

license to Radio Stamford, relied significantly upon the Section 315 violations. Western Connecticut Broadcasting Co., FCC 77D-3, released January 14, 1977. Western has filed exceptions to the Initial Decision, and the matter now is under review by the Commission. 47 U.S.C. §155(d)(4).

While the Section 315 violations were under scrutiny in these two licensing proceedings at the Commission, Mr. Kuczo and Mr. Nocerino filed a complaint in the U.S. District Court for the District of Connecticut alleging that Western had violated their First and Fourteenth Amendment rights by censoring their political broadcast announcements. They invoked the Court's jurisdiction under 42 U.S.C. §1985 and 28 U.S.C. §1343. Their complaint did not mention 28 U.S.C. 1331. (J.A. 6-8.)

In September 1976, after the FCC had issued its forfeiture decision and while the comparative renewal hearing was under way, Western filed a Motion for Summary Judgment. Western argued that the complaint failed to state a cause of action because (1) the acts complained of were those of a private party rather than a state or federal government, and (2) the complaint did not demonstrate either a conspiracy or deprivation of civil rights under the statutes invoked. The Motion and supporting papers also did not mention Section 1331 of Title 28. (J.A. 13-55.)

In the decision under review, the district court denied the defendants' Motion. It stated first that there was a "sufficiently close nexus" between the FCC's licensing authority and the actions complained of to permit a finding of "government action." 14/ Although it agreed with the defendants that there was no demonstration of conspiracy or "discriminatory animus" so as to invoke the court's jurisdiction under the statutes listed in the complaint, the district court found jurisdiction under 28 U.S.C. §1331 for violation of the First Amendment. 424 F. Supp. at 1326-29 (J.A. 169-75). The district court subsequently amended its opinion to permit immediate appeal of "a controlling question of law as to which there is substantial ground for difference of opinion":

> whether the actions of the Western Connecticut Broadcasting Company and its employees constituted federal action subject to the first amendment ....

(J.A. 183.)

14/ The district court found this "nexus" despite its explicit recognition that the conduct in question violated the Communications Act and FCC regulations and that the FCC had taken remedial action against the defendants for this very conduct. It is not clear from the opinion whether the court was aware also of the comparative renewal proceeding that was still in progress at the time the Motion was denied. 424 F. Supp. at 1327-29 and n. 4. (J.A. 171-73 and n. 4 at 174.)

ARGUMENT

The Commission urges reversal of the district court's decision because it is wrong as a matter of constitutional law and because it conflicts with the Commission's well established and essential enforcement policies for Section 315. We will address the legal issues only briefly, because they have been argued exhaustively in the briefs of the appellants and the private amici curiae.[15/] We will attempt to show that sporadic lawsuits of this kind would frustrate the Commission's enforcement policies for Section 315 and possibly chill the robust political programming that section was enacted to encourage.

I. WESTERN'S CENSORSHIP OF THE PLAINTIFFS' POLITICAL MESSAGES WAS NOT GOVERNMENT ACTION.

The First Amendment applies to and restricts only the government and not private persons. Public Utilities Commission v. Pollak, 343 U.S. 451, 461 (1952). Thus, as a threshold matter, the district court had to find that Western's conduct could fairly be treated as that of the

15/ The Commission does not endorse those arguments in full. Insofar as they virtually ignore the Supreme Court's landmark decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), they present an incomplete picture of the law governing the applicability of the First Amendment to broadcast stations. We shall show, however, that Red Lion is entirely consistent with the argument that broadcaster violations of Section 315 are neither government action nor abridgements of the First Amendment rights of political candidates.

government before it could determine that constitutional rights had been abridged. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972). Apparently relying solely upon the assumption that Western had been granted monopoly status in Stamford,[16] the district court purported to find a "sufficiently close nexus" between the broadcaster's conduct and the FCC to satisfy the "government action" requirement.[17] 424 F. Supp. at 1327 and n. 2 (J.A. 170-71 and n. 2 at 174).

This finding ignores the undeviating opinions to the contrary of the courts[18] that have considered whether broadcaster editorial judgments constitute state

16/ The assumption of monopoly status is subject to considerable doubt. While no other stations are licensed to Stamford, the city is served by many stations licensed to nearby communities. The administrative law judge who ruled against Western in the recent comparative renewal hearing found that 20 AM radio stations and 27 FM radio stations serve at least parts of the city. Western Connecticut Broadcasting Co., FCC 77D-3 at 40-41. Several television stations in both New York and Connecticut also serve Stamford.

17/ The "nexus" on which the court relied was "licensing and regulation by the FCC." 424 F. Supp. at 1327-28 (J.A. 170-72). The implications of this theory of state action in broadcasting are far reaching and are discussed briefly below.

18/ A significant exception of which we are aware was the District of Columbia Circuit's decision in Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (1971), which found government action in the FCC's acceptance or approval of broadcasters' bans on editorial advertisements. That decision was reversed in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), which we shall discuss below.

action for purposes of applying the First Amendment. See, e.g., Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950); McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945); Moro v. Telemundo, Inc., 387 F. Supp. 920 (D.P.R. 1974); Smothers v. Columbia Broadcasting System, Inc., 351 F. Supp. 622 (C.D. Cal. 1972); Post v. Payton, 323 F. Supp. 799 (E.D.N.Y. 1971). Indeed, the district court mentioned none of these decisions and treated the question almost as if it were a matter of first impression:

> It has not been resolved what actions by broadcasters licensed and regulated by the FCC constitute federal action.

424 F. Supp. at 1327 (J.A. 170).

The district court's reliance upon the assumed monopoly as sufficient to give the censorship a governmental character also ignores Supreme Court decisions expressly finding that monopoly status does not satisfy the state action requirement. Most recently, in Jackson v. Metropolitan Edison Co., 419 U.S. at 351-52, the Court rejected the proposition that a power company's state-created monopoly, assuming it existed, made the company's conduct state action. The Court said that the relevant factor, assuming there is in fact a monopoly, is the "relationship between the challenged actions of the entities involved and their

monopoly status." 19/ Plainly, Western could have censored the plaintiffs' political messages whether or not it had a broadcast monopoly in Stamford.

The Supreme Court addressed the broadcast state action question in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), but it failed to produce a majority resolution. The Court found that there was no First Amendment right of access to broadcast stations and affirmed a Commission order refusing to require licensees to accept paid editorial announcements. In the plurality opinion, Chief Justice Burger was emphatic in finding that broadcast editorial judgments are not state

19/ See also Moose Lodge No. 107 v. Irvis, 407 U.S. at 176-77 (partial monopoly); Public Utilities Commission v. Pollak, 343 U.S. at 462 (although the Court found state action, it expressly did not rely upon the monopoly status of the transit system). This Court has required that the government be directly involved in the specific challenged conduct before finding state action. See, e.g., New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (1975); Powe v. Miles, 407 F.2d 73 (1968).

action. Noting that Congress had intended a private system of broadcasters free to exercise editorial independence, the Chief Justice stated:

> [I]t cannot be said that the Government is a "partner" to the action of broadcast licensees complained of here, nor is it engaged in a "symbiotic relationship" with the licensee, profiting from the invidious discrimination of its proxy .... The First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts.

412 U.S. at 119. The Chief Justice concluded that the "concept of journalistic independence" could not co-exist with a finding that editorial judgments are governmental action. Id. at 121. See also Justice Stewart's persuasive concurring opinion, in which he pointed out that the state action question was complicated in broadcast cases by the fact that the electronic press "is itself protected from government by the First Amendment." Id. at 132-41. To hold that broadcaster conduct is government action, Justice Stewart suggested, would "produce a result wholly inimical to the broadcasters' own First Amendment rights," by subjecting them to tight governmental scrutiny in their editorial judgments.[20/]

20/ Justices Brennan and Marshall, in dissent, would have found state action. Their analysis, however, did not rely upon monopoly, as it could not; the questions in that case involved broadcasters in monopoly communities as well as cities with scores of stations. The dissent found that the "most

(footnote continued on next page)

Finally, we point out that the requirement of state action serves the dual purpose of permitting broad freedom of private action while ensuring that the government does not violate basic rights indirectly through private agents. In their zeal to ensure the latter, courts must be cautious not to inhibit private institutions that are "free to make choices government cannot -- even seemingly arbitrary ones -- without having to provide a justification that will be examined in a court of law ...." H. Friendly, The Dartmouth College Case and the Public-Private Penumbra, p. 30 (published as a Supplement to the Texas Quarterly, Vol. XII, No. 2, 1969). This Court has recognized the "value in preserving a private sector free from the constitutional requirements applicable to government institutions." Wahba v. New York

20/ (footnote continued from previous page)
important" factor indicating state action was the FCC's specific approval of the conduct in question. 412 U.S. at 179-80. In this case, the district court found it totally irrelevant that the FCC had not merely failed to approve the conduct, but had emphatically disapproved it and had imposed sanctions. 424 F. Supp. at 1327-28 (J.A. 171). If disapproved private conduct is government action, it would appear that approved conduct of the same kind would be all the more actionable if a court believed the approval to be incorrect. Yet private suits against licensees for alleged Section 315 violations, after the FCC had found that no violations had occurred, plainly would not be entertained. The exclusive forum for challenging FCC actions of that kind is the appropriate court of appeals under 47 U.S.C. 402. Ackerman v. CBS, 301 F. Supp. 628, 631 & n. 7 (S.D.N.Y. 1969). The district court's reliance upon Home Telegraph & Telephone Co. v. City of Los Angeles, 227 U.S. 278 (1913), is misplaced. The conduct in that case was the establishment of rates by a municipal rate-making authority -- a governmental action by any test.

University, 492 F.2d 96, 102 (2d Cir.), cert. denied, 419 U.S. 874 (1974), quoted in New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 860 (2d Cir. 1975).

We submit that the plurality opinion in CBS v. DNC provides the correct resolution of the state action question in this case, and that the Court need not reach the First Amendment question.

II. THE FIRST AMENDMENT DOES NOT PROHIBIT BROADCASTERS FROM EDITING POLITICAL MESSAGES.

We do not believe the district court intended its order denying summary judgment to establish a First Amendment right in candidates not to have their political messages edited by broadcast licensees. However, since some language in the opinion can be read to recognize such a right, we will address that issue. In approaching the state action question, the district court stated:

> Conceding, as they must, that the censorship was contrary to first amendment standards ..., defendants maintain that no violation of the first amendment occurred because there was no governmental action.

424 F. Supp. at 1326-27 (J.A. 169).[21/] Similarly, after

21/ In fact, the defendants conceded no such thing. Their Motion for Summary Judgment sought to terminate the suit on grounds that there was no state action and no cause of action under the civil rights statutes invoked by the complaint. There was no need to address the question of First Amendment rights because the other matters were at the threshold; grant of the Motion would have obviated any need to consider whether a First Amendment right existed. See Motion for Summary

(footnote continued on next page)

concluding that the conduct was attributable to the government, the court stated:

> Since our finding of governmental action is premised on licensing and regulation by the FCC, a federal agency, clearly it is the first amendment that has been violated and not the fourteenth ....

424 F. Supp. at 1328 (J.A. 172).

Any First Amendment right that might be involved in this case is a right of access to the airwaves. But the Supreme Court has firmly rejected the notion that such a right exists, holding that the regulatory scheme of private broadcasters with broad journalistic freedom fully satisfies First Amendment goals in the unique electronic news media. CBS v. DNC, 412 U.S. at 121-32. See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Cf. Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976). The holding of CBS v. DNC alone is sufficient to defeat any claim to a constitutional right in this case.

21/ (footnote continued from previous page) Judgment and supporting papers (J.A. 13-54). Wholly apart from the substantive error of the district court in finding state action, we submit that it would have been improper to recognize a First Amendment right at this stage of the proceeding when neither party had addressed the issue. The district court set forth no analysis for a First Amendment ruling and cited no cases that are remotely in point. This alone would justify reversal if the district court is perceived as making a First Amendment ruling.

The courts long and consistently have recognized that the First Amendment has a meaning for broadcasting that is different from its meaning for other media of expression. See, e.g., National Broadcasting Company v. United States, 319 U.S. 190, 210-17 (1943); Capitol Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), aff'd sub nom. Capitol Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), cited at Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 773 (Burger, C.J., concurring)(1976). The First Amendment goal in broadcasting is an informed public. The "paramount right" belongs neither to the broadcaster, Red Lion, 395 U.S. at 390, nor to people who want access to broadcast facilities to expound their own views, CBS v. DNC, 412 U.S. at 121-32. Rather, it is the right of the viewers and listeners that is paramount. The Supreme Court said it succinctly in Red Lion:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

395 U.S. at 390.

With the Supreme Court's approval, Congress has established a licensing scheme that gives broadcasters the temporary privilege of using designated frequencies. They have broad discretion in deciding how to use those

facilities, what programs to air, and a myriad of matters incidental to operation of a station. But they must satisfy the Commission at the end of each three-year licensing period that they have operated in the public interest and that they should have their licenses renewed. 47 U.S.C. §307. [22/]

Within this scheme of regulation, the broadcaster serves as an editor with broad journalistic discretion. CBS v. DNC, 412 U.S. at 121-32. [23/] The presumption is that a licensee who has public interest obligations and is accountable to the FCC at regular intervals will exercise mature and responsible editorial judgment while recognizing certain limitations on his discretion. Compare Red Lion, 395 U.S. 367, and CBS v. DNC, 412 U.S. 94, with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The

22/ For a comprehensive but brief summary of the regulation of broadcast program content, see Red Lion, 395 U.S. at 375-95. See also CBS v. DNC, 412 U.S. at 101-14.

23/ See also National Broadcasting Co., Inc. v. FCC, 516 F.2d 1100 (D.C. Cir. 1974), vacated other grounds, 516 F.2d 1180 (1975), cert. denied sub nom. Accuracy in Media, Inc. v. NBC et al., 424 U.S. 910 (1976).

limitations include the "fairness doctrine" [24/] and Section 315.

The complaint in this case arises under Section 315 rather than under the First Amendment. The plaintiffs are entitled to have the FCC enforce Western's statutory duty under Section 315 not to censor political messages. [25/] But Section 315 is a statutory requirement -- not a constitutional one. See Red Lion, 395 U.S. at 380.

If the plaintiffs had a constitutional right not to have their political announcements censored by a broadcast licensee, the statute would be superfluous. But Section 315 is not mere surplusage. Recognizing that the regulatory scheme it had created would enable licensees to treat political candidates unequally, Congress made special provision in Section 315 for election campaigns. It carved an

---

24/ For the Commission's most recent statement of the fairness doctrine, see Fairness Report, 48 FCC 2d 1 (1974), 58 FCC 2d 691 (1976), review pending sub nom. National Citizens Committee for Broadcasting et al. v. FCC, Nos. 74-1700 et al., D.C. Circuit. The fairness doctrine, which requires licensees to discuss controversial issues of public importance and to present disparate views, has been found permissible under the First Amendment, but no court has found that it is required. Attacks on the doctrine by broadcasters have suggested that the doctrine abridges their First Amendment rights. They have been unsuccessful. E.g., Red Lion, 395 U.S. 367. Attacks from the other direction, suggesting that the First Amendment requires broader rights such as access, also have been unsuccessful. E.g., CBS v. DNC, 412 U.S. 94; Public Interest Research Group v. FCC, 522 F.2d 1060.

25/ See Western Connecticut Broadcasting Co., 43 FCC 2d 730 (J.A. 132).

area out of the licensee's editorial discretion and required "equal opportunities" for all candidates for an office when a broadcaster has made his facilities available to one candidate. The duty thus created is an exception to the general rule of licensee discretion; it recognizes a congressional priority rather than a constitutional right.

Moreover, Congress would not have the power to suspend Section 315 if the right were constitutional, as it did in the 1960 elections to permit the Kennedy-Nixon debates.[26/] Nor would the Commission have the broad discretion the courts have allowed it in interpreting Section 315 if the statute merely restated or recognized constitutional rights. See Chisholm v. FCC, 528 F.2d 349 (D.C. Cir.), cert. denied, ___ U.S. ___ (1976).[27/]

The entire history of Section 315 is consistent with the proposition that it merely created statutory duties for broadcasters. There is no basis for finding a constitutional right that duplicates the statute. See Farmers Union v. WDAY, 360 U.S. 525; Daly v. CBS, 309 F.2d 83 (7th

---

26/ P.L. 86-677, 47 Stat. 554, 86th Cong., 2d Sess. (1960). Indeed, the Senate Committee on Interstate and Foreign Commerce has stated that it would not hesitate to remove Section 315 completely if there were no scarcity of frequencies. S. Rep. No. 562, 86th Cong., 1st Sess. 8-9. (1959).

27/ The petitioners in Chisholm did not argue that the constitution required the result they sought. Their argument was that the FCC had misconstrued the statute and thus had acted beyond its authority.

Cir. 1962); Massachusetts Universalist Convention v. Hildreth, 183 F.2d 197; McIntire v. William Penn Broadcasting Co., 151 F.2d 597; Gordon v. NBC, 287 F. Supp. 452 (S.D.N.Y. 1968). Cf. Alexandra Mark v. FCC, 468 F.2d 266 (1st Cir. 1972).

III. IMPLICATION OF A DAMAGES REMEDY FOR CENSORSHIP OF SECTION 315 ANNOUNCEMENTS WOULD FRUSTRATE VITAL REGULATORY POLICY.

As we pointed out in the statement, the FCC has abundant remedial powers to deal with Section 315 violations. In this very case, it has (1) imposed the maximum forfeiture allowed by law, (2) considered and rejected the possibility of revocation, and (3), at least tentatively through an initial decision of an administrative law judge, refused to renew Western's license in part because of the Section 315 violations. In addition, the plaintiffs could have avoided injury altogether by bringing the matter to the Commission's attention as soon as it occurred. The Commission could have granted immediate relief in the form of a directive to Western to stop censoring the broadcasts.

These administrative remedies not only are adequate, but they further the First Amendment goals for broadcasting in a manner that damage liability would not. As we have pointed out, the "paramount interest" under the First Amendment in broadcasting is the viewer or the listener -- not the broadcaster or the party seeking air time to expound

his own views. Red Lion, 395 U.S. 367; CBS v. DNC, 412 U.S. 94. An award of damages might punish a violative broadcaster and vindicate a censored politician; but it would do nothing for the viewers and listeners whose right is "paramount."

The Commission's on-the-spot enforcement program, by contrast, provides the viewer and listener with the information and political byplay that Section 315 was designed to encourage. To the extent that the availability of damages might discourage candidates from resorting to immediate and specific relief from the Commission, it would disserve the very First Amendment values upon which the plaintiffs rely.

In a broader sense, if broadcast licensee editorial judgments were regarded as state action susceptible to sporadic suits for damages, the Commission's regulatory processes and the congressional scheme of broad editorial discretion might become skewed. This state action rationale could not draw the line at political candidates. The editorial discretion that Congress has deliberately conferred on broadcasters, with the approval of the Supreme Court, would be undermined by the availability of suits for damages by those who disagree with a particular exercise of the discretion and couch their disagreement in constitutional terms. This inevitably would have a chilling effect on programming decisions. The government -- whether it be the legislative,

the executive or the judiciary -- should remain largely outside this sensitive area. In the regulatory scheme chosen for it by Congress, the Commission "walks a tightrope" between saying too much and saying too little about programming.[28/] It has developed some skill at this. The courts could upset the delicate balance by moving with all good intentions into an area already adequately policed in the public interest.

Respectfully submitted,

Werner K. Hartenberger,
General Counsel,

Daniel M. Armstrong,
Associate General Counsel,

John E. Ingle,
Counsel,

Robert S. Foosaner,
Counsel.

Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112

April 19, 1977

28/ Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied sub nom Tobacco Institute v. FCC, 396 U.S. 842 (1969).